

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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<i>In the Matter of</i>)	
)	
Executive Branch Review of FCC Applications)	IB Docket No. 16-155
And Petitions with Foreign Ownership for)	
National Security, Law Enforcement, Foreign)	
Policy, and Trade Policy Concerns)	
)	

REPLY COMMENTS OF GSMA

GSMA hereby respectfully submits reply comments on the Notice of Proposed Rulemaking issued by the Federal Communications Commission (“FCC” or “Commission”) in the above proceeding. GSMA is an international association representing the interests of mobile operators globally, including nearly 800 operators as well as hundreds of handset manufacturers, software companies, Internet companies, equipment providers, and other companies in the mobile ecosystem, including many in the United States. It is in this context that GSMA submits these reply comments to support the broad consensus among commenters calling for a streamlined review process of relevant telecommunications petitions and applications before the Executive Branch (“Team Telecom”) while also recognising the need to limit such reviews only to those cases in which national security concerns are truly at issue, as well as the need to limit information and certificate requests to those items covered by current review processes and current national laws. While the Executive Branch’s review process is undeniably and critically important, the GSMA urges the Commission to consider the need to foster an atmosphere conducive to

investment in the communications sector and to prevent the creation of a competitive disadvantage to those applicants and petitioners who would be affected by increased obligations.

On May 10, 2016, the National Telecommunications and Information Administration (“NTIA”) filed a letter on behalf of the Executive Branch requesting that the Commission make changes to its processes that would help facilitate a more streamlined Executive Branch review process. The NTIA recommends the Commission to require applicants seeking Section 214 authorizations or transfer of such authorizations, submarine cable landing licenses, satellite earth station authorizations, and Section 310(b) foreign ownership rulings, to provide certain information as part of their applications.

The Executive Branch specifically asks that applicants with reportable foreign ownership provide certain information regarding ownership, business models, network operations, and related matters, and that all applicants, regardless of whether they have reportable foreign ownership, certify that they will comply with applicable law enforcement assistance requirements and respond truthfully and accurately to lawful requests for information and/or legal process. The NTIA’s letter states that such requirements will improve the ability of the Executive Branch to expeditiously and efficiently review referred applications, particularly in regard to identifying and assessing applications that raise national security or law enforcement concerns. The letter further states that the proposed certifications, in many cases, may eliminate the need for national security or law enforcement conditions, and thus facilitate expeditious responses to the Commission on specific applications.

Following a first round of comments to the NTIA’s letter from stakeholders, on 24 June 2016 the FCC issued a Notice of Proposed Rulemaking (“NPRM”). The NPRM proposes specific changes to the existing rules, designed to address the NTIA’s recommendations, and proposes to

adopt time frames for Executive Branch review of applications and other changes to its processing rules.

The GSMA is pleased to have the opportunity to put forward its reply comments to the proposed rulemaking relating to the review of the Team Telecom review process. As the global association of the mobile industry, the GSMA combines its global perspective with the local insight of its members to promote regulatory frameworks and procedures that support competition, investments and the long-term growth of the sector. These reply comments are drawn on our experience in regulatory best practices from around the world.

I. INTRODUCTION AND SUMMARY

In the matter of the proposed rulemaking, we would like to put forward three overarching comments.

Firstly, the GSMA urges the FCC to identify procedures which adhere to the principles of transparency, proportionality and non-discrimination and to strike the right balance between administrative efficiency, a minimal administrative burden on applicants, and any unintended consequences. As one of the world's leading telecommunications regulators, the FCC has the opportunity here to set the highest regulatory standards and a positive example for others to follow.

Secondly, it is important to focus the scope of the review. The revised procedure should not raise the administrative and compliance burden for all those routine applications that do not raise concerns which the Team Telecom review process is intended to address. As such, the FCC should not refer applicants to Team Telecom when the applicants are already subject to a

mitigation agreement and there have been no material changes in foreign ownership (e.g., *pro forma* filings).¹

Thirdly, it is paramount that the adopted revised procedure creates legal certainty and imposes a fair and proportionate administrative burden for those companies that meet the threshold for the Team Telecom review process so as not to discourage foreign investments and trade.

We provide below more specific comments in relation to the three main themes we have identified: i) Scope of the information requested; ii) Scope of certification requirements; and iii) Timeframe for the Executive Branch review.

II. SCOPE OF THE INFORMATION PROVISION

The proposals in the NTIA's letter that initiated the review process have generated insightful comments from previous respondents. These commenters have largely identified concerns the GSMA believes should be the focus here.

Chiefly, many have rightly asked for the scope of the review to be limited to those applications with reportable foreign ownership. Many commenters have advocated for exempting *pro forma* filings from Team Telecom review, or even exempting applicants already subject to mitigation agreements from further Team Telecom review. In the absence of evidence showing resulting improvements to the process, such additional burdens on all applicants appears unwarranted, imposing unnecessary additional burdens and costs on all parties. Above all, it could act as a deterrent to foreign investments in the sector.

¹ Wiley Rein LLP Telecommunications Companies Comments at 9 ("Wiley Rein Comments"); Kelley Drye & Warren Comments on behalf of BT Americas, Deutsche Telekom, Orange Business Services U.S., Telefonica Internacional USA at 7 ("Kelley Drye Comments").

Restricting the scope of the review seems therefore the right approach to take. This would be also in line with international best practices and in particular with the principle of proportionality. As one commenter submits, the U.S. Team Telecom process is already far more stringent than many other nations' clearance processes for foreign investment in the telecommunications sector.²

Secondly, the proposals would require information currently not requested in the initial questionnaires to be included in future applications. These include: explanation of business models in the United States for the next 5 years; names of financial institutions providing financial assistance along with audited financial statements; a list of all FCC licenses along with all licenses held by affiliates; and whether records may be accessed and/or made available in the US within 3 business days of receipt of lawful US process (not required by the Communications Assistance to Law Enforcement Act, "CALEA").

Previous respondents have rightly highlighted the unnecessary nature of certain of those additional requirements, particularly given duplication of existing procedures and legal requirements, and the increased inefficiencies risked by their inclusion.³

Finally, as CTIA correctly asserts, some of the additional information which would be required under the proposals raises serious concerns of confidentiality for the applicants, and that,

² See "A Comparative Analysis of Team Telecom Review," Hogan Lovells White Paper (submitted 18 Aug. 2016).

³ CTIA Comments at 7 ("In that this information is not requested in the existing Executive Branch questionnaires, its new inclusion undermines NTIA's stated objective of efficient review."); US Telecom Comments at 7 ("[T]he scope of this information request may be overly broad and potentially outside the scope of what is necessary to determine any potential effect on national security, law enforcement, foreign policy or trade."); T-Mobile Comments at 9 ("Clearly, requiring the submission of information that expands the scope of Team Telecom's review and needlessly increases the burden on applicants is not consistent with the public interest or the articulated goals of this proceeding."); Verizon Comments at 5 ("The Commission should therefore not establish any certification requirement in its licensing regime that creates new or separate obligations that would either duplicate or expand pre-existing and separate legal requirements.").

“[g]iven the highly confidential and sensitive information that would be collected through the questionnaire, there is no reason to disseminate that information any more than is necessary.”⁴ The nature and type of it could be highly sensitive for their businesses. Such information, because of its very nature, should be collected only where strictly necessary, and guarded under clear confidentiality rules.

We therefore encourage the FCC to carefully evaluate the confidentiality issues raised by the proposals in the context of the admirable goals this review of the Team Telecom process is trying to achieve, namely streamlining the procedure and providing legal certainty to the applicants.

III. CERTIFICATION

The GSMA further urges the FCC to reconsider the scope of the proposed additional certifications. Firstly, in the interest of a streamlined process, certification requirements should focus only on those application that raise issues for which the review process has been established, and not on all applicants.

Additionally, many respondents highlighted the risk that some of the proposed certifications could go beyond current legal requirements, and in some instances may duplicate existing certifications provided to the Executive Branch. For example, the CTIA in its comments highlights how the NTIA proposal for certification regarding the “mak[ing] [of] communications to, from or within the United States, as well as records thereof, available in a form and location that permits them to be subject to a valid and lawful request or legal process in accordance with

⁴ CTIA Comments at 9.

U.S. law’ raises significant customer privacy and security concerns” and could even go so far as to require operators to break security measures on customers’ accounts and phones.⁵ Similarly, US Telecom rightly points out that requiring operators to “identify, intercept, or provide to law enforcement documentation of communications within and outside the [US]” may cause confusion and legal uncertainty for operators and investors.⁶

Furthermore, as noted by some commenters,⁷ the proposed requirement to certify the availability of records in a location and form that permits them to be subject to a valid and lawful request or legal process could impose obligations to enforce localization and repatriation of data which seems to go beyond what is required to streamline the Team Telecom review process, could be contrary to US commerce and trade policy. This could trigger retaliatory legislation from other jurisdictions that would hinder foreign investments and trade. Commissioner Pai even raised this concern in his statement on the NPRM (“Moreover, it could open a Pandora’s Box by inviting foreign nations to issue similar requests for information held by U.S.-based companies, or otherwise make it harder for those companies to do business abroad.”).⁸ As a global leader in telecommunications regulation, the FCC has the opportunity to establish positive standards and to set the tone and direction of international best practices.

IV. TIMEFRAME

Above all, the current reform should ensure clarity and certainty through the adoption of a mandatory timeframe. Addressing the current lack of certainty over the timing of the Team

⁵ CTIA Comments at 11.

⁶ See US Telecom Comments at 9-10.

⁷ See T-Mobile Comments at 16; Kelley Drye & Warren Comments at 14.

⁸ See, Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership, Notice of Proposed Rulemaking, IB Docket No. 16-155 (June 24, 2016), Statement of Commissioner Pai at 1.

Telecom Review process is indeed one of the key laudable objectives of this NPRM. Certainty requires a clear, reasonable timeframe and a transparent, clear process to manage exceptions, including, if necessary, limited extra time which should be proportionate to the complexity of the case in hand.

A number of respondents support the 90-days timeframe (with a possible extension of another 90 days) for the review of cases should be adopted.⁹ This is actually much longer than the timeframe adopted by the Committee on Foreign Investments in the US (CFIUS), which in substance carries out an assessment which is comparable in nature and scope to the Team Telecoms Review process. The CFIUS timeline consists of a 30-day initial review period,¹⁰ followed by a possible 45-day investigation period,¹¹ which might then be followed by a 15-day period for the president to either permit or block the transaction. As this process has worked rather smoothly for years, there is no reason these timelines should not also apply to Team Telecom. Some commenters go even further, pointing out that since the same agencies sit on both Team Telecom and CFIUS, Team Telecom review is duplicative and unnecessary when a transaction is also reviewed by CFIUS.¹² In addition, while the procedure should allow the flexibility to deal with exceptionally complex cases, any such extension should be clearly and transparently motivated, and should be kept within the confines of clear parameters to minimise uncertainty. By the same token, commenters agree that any reasonably requested extension should be limited in scope, with no commenter supporting any extension of more than 90 days. We find this a reasonable basis, given it would double the time required to deal with “business as usual” reviews.

⁹ *E.g.*, CTIA Comments at 4-6; US Telecom Comments at 3-4; Sprint Comments at 2-4; T-Mobile Comments at 12; Verizon Comments at 3; Wiley Rein Comments at 5-7.

¹⁰ 31 C.F.R. § 800.502(b).

¹¹ 31 C.F.R. § 800.506(a).

¹² Hogan Lovells comments at 6.

While commenters may vary on the specifics of extensions and timeframes by a matter of small degree, the important principle to keep in mind, as the FCC seems to do in its NPRM, is that of procedural certainty, which encourages confident investment and engagement.

V. CONCLUSION

The GSMA thanks the Commission for this opportunity to submit its reply in support of commenters seeking certainty and a reasonable scope of informational and certification obligations. The GSMA recognises and appreciates the important work of the Team Telecom Review process and applauds the FCC for its stated goal of streamlining the process for the sake of administrative efficiency and reducing burdens on petitioners and applicants. The GSMA urges the FCC, in its decision making process, to bear in mind the critical principles of transparency, proportionality and non-discrimination and to ensure a healthy environment for competition and investment. In so doing, the GSMA is confident that the FCC will remain a global leader and good example for regulators worldwide.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John Giusti". The signature is fluid and cursive, with a prominent initial "J" and a trailing flourish.

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